HONOUR PROPERTIES SDN BHD & ANOR

v.

DUNIAGA SDN BHD

HIGH COURT MALAYA, PENANG
RK NATHAN J
[COMPANIES WINDING UP NOS: 28-43-1997 & 28-51-1997]
30 SEPTEMBER 2002

COMPANY LAW: *Winding-up - Housing developer - Consent judgment - Consent judgment by creditors to distribute progress payment payable to developer among themselves - Whether ultra vires - Whether to be set aside for illegality - Progress payment thereof - Whether to be remitted to developer's Housing Development Account - Companies Act 1965 s. 221 - Housing Developers (Control And Licensing) Act 1966 ss. 7A, 24 - Housing Developers (Housing Development Account) Regulations 1991 rr. 4, 7*

The petitioner herein had petitioned to wind-up the respondent, a housing developer, pursuant to s. 218(1) of the Companies Act 1965. The petition was opposed by the respondent's other creditors, including one Smart Ventures Sdn Bhd ('Ventures'), whom the respondent had owed RM2,111,516.12 for work done on the latter's Halaman Damai Project ('the project'). On 12 June 1998, the petitioner, the creditors and the purchasers of the units at the project recorded a consent judgment whereupon the purchasers agreed to pay the balance purchase price for their units totaling RM2,941,407, for same to be distributed among the parties as per their respective entitlements. Subsequently, however, Ventures took the view that the consent judgment was ultra vires the Housing Developers (Control and Licensing) Act 1966 ('the Act'), and in the circumstances, pending hearing of the petition, applied inter alia for declarations that the said judgment was invalid and be set aside, and for the above sum to be remitted to the respondent's Housing Development Account pursuant to s. 7A of the Act. The issue that arose was whether the court in law could and ought to make the interim orders sought for.

Held:

[1] Although the petition has yet to be heard by the court, the court is empowered by s. 221 of the Companies Act 1965 to make interim or other orders it thinks fit. (p 36 i)

[2] The effect of the consent order is to direct the payment of the penultimate 15% of the progress payment, which should be paid into the respondent's Housing Development Account, to be paid to third parties including

Ventures. That being the case, the said consent order expressly contravenes the statutory provisions and is therefore invalid and illegal. (p 36 e)

[3] Although one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction, there is an exception to the rule when the final judgment could be proved to be null and void on ground of illegality, and where the application to set aside is done 'within the same proceedings or action in which the same order was obtained and not in a separate fresh proceedings or new action', as is the case here. In the premises, the consent judgment is set aside and the monies must be paid into the respondent's Housing Development Account. (p 36 g)

[Order in terms of application]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(foll)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(e), (i), (2)(a), 221
Housing Developers (Control & Licensing) Act 1966, ss. 7A(3), 24
Housing Developers (Housing Development Account) Regulations 1991, rr. 4, 7

For the Intervener Malayan Banking Berhad - Ramsun Ho Chii Huey; M/s See, Ramsun & Tan
For the respondent Duniaga Sdn Bhd - SC Chew; M/s Chew Sien Chee & Co
For the petitioner Koay Heng Siew Co Sdn Bhd - M Thayalan; M/s Thayalan Assocs
For the petitioner Honour Properties Sdn Bhd - Ooi Teik Ho; M/s Ooi Lee & Co
For the intervener Resvent Sdn Bhd - Frederick Kong (HC Tan); M/s HC Tan & Zahani
For the interveners Malaysian Building Society Bhd, Affin Bank Bhd & Southern Bank Bhd - Zarizana Abdul Aziz (Raymond Tong); M/s K Ahmad & Yong
For the intervener Smart Ventures Sdn Bhd - K Kirubakaran; M/s R Rajasingam & Co
For the interveners UDA Holding Bhd - Bernard Kok; M/s Ban Eng Anual & Foong

Reported by WA Sharif

JUDGMENT

RK Nathan J:

Facts

The petitioner, Honour Properties Sdn Bhd, applied (Winding Up Petition No. 28-43-97) to wind-up Duniaga Sdn Bhd (Duniaga), a Housing Developer,

pursuant to s. 218(1)(e) and (i) of the Companies Act 1965 on the basis that Duniaga was indebted to the petitioner in the sum of RM126,417.68 as at 25 November 1995 together with interest thereon at 10% p.a. and costs of RM1,554 pursuant to a judgment pronounced on 20 June 1997 in the Sessions Court at Butterworth *vide* Summons No. 52-134-97. Alternatively, the petitioner sought to wind-up Duniaga pursuant to a s. 218(2)(a) of notice of demand. Two other creditors, namely Smart Ventures Sdn Bhd (Ventures), Koay Heng Siew Co Sdn Bhd (Koay) and Resvent Sdn Bhd (Resvent) gave notice of their intention to attend the hearing of the petition on 21 January 1998. Ventures and Resvent opposed the winding-up petition. Duniaga had granted Ventures various contracts upon a project called Halaman Damai Project; hence its intention to oppose. In the meantime, the purchasers of various units in the Halaman Damai Project through its chairman, Teoh Kim Huat (Teoh) and also as representing all other 167 purchasers of various units applied for a stay of all proceedings until the relevant certificates of fitness, in respect of the units they had purchased from Duniaga as vendor and developer, were issued. Teoh also filed an application to oppose the winding-up petition.

On 12 June 1998 parties arrived at a settlement and recorded consent judgment. All the purchasers of the Halaman Damai Project agreed to pay up the balance 20% due on the purchase into a trust account to be operated by the petitioner's solicitors. It was also a term of the settlement that out of the sum of RM2,941,407 to be collected as balance from the purchasers, 75% of the said sum was to be distributed as follows:

1) Koay .. RM393,000

2) Petitioner .. RM114,000

3) Resvent .. RM325,000

4) the balance 25% of the sum collected to be paid to Ventures in full settlement of the debt due. There were also other incidental and consequential orders.

After the settlement order was extracted, Teoh affirmed an affidavit on 22 October 1998 in which he disclosed that Duniaga had in fact entered into an agreement with Perbadanan Pembangunan Bandar (UDA) as owners and Duniaga as the Developer. The said agreement was dated 10 December 1990. UDA which owned the lands on which the Halaman Damai Project was being constructed agreed to transfer the said lands to Duniaga for a sum of RM7,984,000. The said sum was to be paid progressively within four years. Duniaga failed to do so. UDA and Duniaga then entered into a supplemental

agreement on 16 December 1995 whereby in forbearance of UDA initiating legal action, Duniaga agreed to settle the balance due and to complete the development of the various projects agreed to in the principal agreement within an extended three years. Again, Duniaga failed to honour the supplemental agreement. Parties then entered into a second supplemental agreement on 26 March 1997 which gave Duniaga a further six months on this extension. Duniaga again was unable to complete the Halaman Damai project within the extended six months. The parties then entered into another supplemental agreement. By this agreement UDA agreed to grant Duniaga a loan of RM2,400,000 to complete the said project progressively. Duniaga again failed to complete. UDA then terminated all agreements and sued for the full sum inclusive of the loan of RM2,400,000 *vide* Pulau Pinang High Court Civil Suit No. 22-788-98 and took possession of its lands.

Teoh thus contended in his affidavit that since Duniaga's services had been terminated by UDA and since Duniaga was in no position to hand over the completed units to the buyers, the buyers were not prepared to pay the balance of 20%. Since the settlement agreement was entered into without knowing these facts Teoh averred that the settlement agreement ought to be varied in that, that part of the order requiring the purchasers to pay the 20% ought to be set aside. A notice of motion to this effect was filed by Teoh's solicitors. The petitioner, of course, opposed this and contended it was too late in the day for the purchasers to recant. However by consent the said motion was struck out.

In respect of the winding-up petition No. 28-51-97 filed by Koay against Duniaga the claim was for RM412,198.28 as at 3 December 1997 with continuing interest at 8% p.a. on the sum of RM393,401.25 from 4 December 1997 pursuant to a judgment of the High Court at Penang *vide* CS No. 22-126-97 obtained on 4 August 1997. There was no response from Duniaga to a s. 218 notice from Koay.

On 3 July 2002 Malayan Banking Berhad applied to intervene (encl. 44), Malaysia Building Society Berhad (MBSB) applied to intervene by way of encl. 47 and Affin Bank Berhad by way of encl. 56 and Southern Bank Berhad by way of encl. 68. In all these applications the respondent was absent although served with the relevant cause papers. I granted orders in terms of encls. 44, 47, 56 and 68.

Findings Of The Court

Enclosure 62 was partially contested on 4 July 2002. This was an application by ventures for the following orders:

(a) to intervene

(b) for a declaration that the settlement agreement dated 12 June 1998 is invalid.

(c) that the said settlement agreement dated 12 June 1998 be either set aside or cancelled.

(d) for a declaration that the sum of RM2,206,055.25 which is 15% of the total sale price of the units of Halaman Damai Project is trust money which ought to be placed in the trust account of the respondent held in Malayan Banking Berhad, Gelugor Branch, Pulau Pinang *vide* Account No. 007152-60002-6.

(e) that all purchasers of the units, all banks and financial institutions including the Malaysian Government that had loaned money to the purchasers, in respect of the Halaman Damai Project in respect of the sales of units entered into between the said purchasers and the respondent amounting to RM2,206,055.25 do pay their respective balances into the trust account of the respondent held in Malayan Banking Bhd, Gelugor Branch Pulau Pinang *vide* A/c No. 007152 -60002-6.

(f) Costs.

(g) such further or other relief this court deems fit and proper.

In its supporting affidavit to the said application ventures' director pointed out that pursuant to the Housing Developers (Housing Development Account) Regulations 1991 the respondent had to open a trust account which the respondent did at Malayan Banking Berhad, Glugor Branch, *vide* Account No. 007152-60002-6. Ventures were the main contractors in respect of the Halaman Damai Project to be built by the respondent on land belonging to UDA and although Ventures had completed all its works and had obtained the certificate of fitness, the respondent still owned ventures RM2,111,516.12. This, ventures contended, ought to be paid into the housing development account pursuant to s. 7A of the Housing Developers (Control and Licensing) Act 1966 which reads as follows:

Section 7A

(1) Subject to subsection (9), every licensed housing developer shall open and maintain a Housing Development Account with a bank or finance company for each housing development undertaken by the licensed housing developer.

(2) Where a housing development is to be developed in phases, the licensed housing developer shall open and keep a Housing Development Account under subsection (1) for each phase of such housing development.

(3) The licensed housing developer shall pay into the Housing Development Account of a housing development the purchase monies received by the licensed housing developer from the sale of housing accommodation in the housing development and any other sum or sums of money which are required by regulations made under this Act to be paid into the Housing Development Account.

(4) The licensed housing developer shall not withdraw any money from the Housing Development Account except as authorised by regulations made under this Act.

(5) Subject to subsection 6(b), all monies in the Housing Development Account shall, notwithstanding any other written law to the contrary, be deemed not to form part of the property of the licensed housing developer in the event:

(a) the licensed housing developer enters into any composition or arrangement with his creditors or has a receiving order or an adjudication order made against him; or

(b) the licensed housing developer, being a company, goes into voluntary or compulsory liquidation.

(6) Upon the happening of any of the events referred to in subsection (5):

(a) the monies in the Housing Development Account shall vest in the official receiver, trustee in bankruptcy or liquidator as the case may be, to be applied for all or any of the purposes for which monies in the Housing Development Account are authorised by regulations made under this Act to be withdrawn; and

(b) any money remaining in the Housing Development Account, after all payments have been made pursuant to paragraph (a) of all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled, shall be held by the official receiver, trustee in bankruptcy or liquidator as the case may be, as money belonging to the licensed housing developer to be applied in accordance with the law relating to bankruptcy of or the winding-up of a company.

(7) ...

(8) ...

(9) ...

(10) Any housing developer who contravenes or fails to comply with this section shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than ten thousand ringgit but which shall not exceed one hundred thousand ringgit and shall also be liable to imprisonment for a term not exceeding three years or to both.

It is also necessary to refer to r. 4 and 7 of the Housing Developers (Housing Development Account) Regulations, 1991 made pursuant to s. 24 of the Housing Developers (Control & Licensing) Act 1966.

Rule 4 imposes a mandatory obligation on the respondent to deposit all monies whether in respect of instalments of purchase price or otherwise paid by a purchaser into the housing development account. Rule 7 lists 15 grounds under which money from the housing development account can be withdrawn and it would seem that pursuant to sub-cl. (e) which provides for payment for cost of carrying out soil investigations, earthworks, foundation works, building works, external works, site and boundary survey for each lot, infra structure works, relocation of squatters and other works, Ventures, as the main contractor who carried out the building works has a right to claim from this housing development account. Having read the numerous affidavits and the law relating to this issue it is my judgment that the effect of the consent order entered into on 12 June 1998 is to direct the payment of the penultimate 15% of the progress payment, which should be paid into the respondent's housing development account, to be paid to third parties including Ventures. I hold that the said consent order is invalid as expressly contravening the statutory provisions and is therefore illegal. In *Badiaddin bin Mohd Mahidin and Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC the Federal Court held that whilst it is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction as in this case, the one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. The Court of Appeal also held that the application to set aside must be done "within the same proceedings or action in which the same order was obtained and not in a separate fresh proceedings or new action ...". In the light of this authority I do hereby set aside the consent judgment dated 12 June 1998 on grounds of illegality in that the said balance ought to be paid into the housing development account of the respondent held in Malayan Banking Berhad, Gelugor Branch, Pulau Pinang *vide* A/c No. 007152-60002-6.

There is one other issue I must address myself. Since the winding-up petition has not been heard as yet, can this court make interim orders. Section 221 of the Companies Act 1965 gives this court the power to make interim or other orders that it thinks fit. In fact in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 CA the Court of Appeal held that whilst

the only final order a court hearing a winding-up petition could make is either to direct a winding-up or to dismiss the petition, it may make interim orders e.g. by appointing a provisional liquidator or a receiver and manager pending the final disposal of the petition, but it may not make an order as to the distribution or disposal of the assets of a company.

Both the petitioners had no objection to ventures' application. Malayan Banking Bhd and MBSB also had no objection but reserved their right to apply to vary if necessary. However UDA objected only in respect of prayers (d) and (e). Mr Oh for UDA argued that since the licence of the respondent as shown in the exhibit to the affidavit in support had expired on 21 February 1997, it was no longer a licensed housing developer. Mr Oh referred to s. 7A(3) of the Housing Developers (Control and Licensing) Act 1966 and argued that the said section would seem to indicate that it would apply to a practising licensed housing developer. Such an argument is fallacious. The moneys became due and payable into the housing development account when the respondent; acted pursuant to the licence granted to it. If half-way through, its licence is terminated or it expires, that does not mean that the moneys due under the sale and purchase agreement cannot be paid into the trust account. In fact it is specifically with a view to tackling cases such as these when the developer's licence expires or is terminated, that this housing development account was set up. This will ensure orderly collection of the balance of the purchase price and orderly disbursement only under the 15 grounds set out earlier.

Having heard arguments I granted an order in terms of prayers (a), (b), (c), (d) and (e).

In the exercise of my discretion, I made no order as to costs. I also ordered that the official receiver be appointed the provisional liquidator to handle the affairs of the respondent until the hearing of the winding-up petition.